
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

**STATE OF WASHINGTON,
Respondent,**

v.

**JUSTIN J. FORD,
Appellant.**

APPELLANT’S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Justin J. Ford, was convicted of possession of heroin and sentenced to twenty-four months in prison. On appeal, he makes three arguments. First, he argues the reasonable doubt jury instruction used in his case was erroneous because it omitted from the required instruction the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]." The erroneous instruction, which allowed the jury to infer Mr. Ford was required to provide reasons to acquit, undermined the presumption of innocence, violated Mr. Ford's due process rights, and requires reversal.

Next, he argues the State failed to prove he had dominion and control over the heroin when two witnesses gave uncontradicted testimony that one of the witnesses put the heroin in his backpack when the police arrived.

Finally, he argues improper prosecutorial comment during closing arguments, when the prosecutor equated

guilt with the jurors' certain knowledge they did "the right thing," deprived him of a fair trial.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in giving an incomplete jury instruction on reasonable doubt, omitting the required sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]."

2. The superior court erred in failing to instruct the jury the defendant had no burden of proving a reasonable doubt.

3. The superior court erred in allowing the issue of Mr. Ford' guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

4. The superior court erred in allowing the State to make an improper, prejudicial comment during closing arguments.

B. Issues Pertaining to Assignment of Error

1. When the trial court's jury instruction on reasonable doubt followed the pattern instruction except it omitted the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]," allowing the jury to infer the defendant was required to establish reasonable doubt to acquit, did the instruction amount to constitutional error that was either structural or not harmless beyond a reasonable doubt, requiring reversal?

2. Two witnesses in this case gave uncontradicted testimony that one of the witnesses had put heroin in Mr. Ford's backpack as the police arrived at the residence. Under these circumstances, did the State fail to prove Mr. Ford's dominion and control over the heroin found in his backpack?

3. Was the State's objected-to mischaracterization of reasonable doubt during closing argument, where it equated guilt with the jurors' certain knowledge they did "the right thing," improper and prejudicial such that reversal is required?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed August 23, 2011, the State charged Mr. Ford with possession of a controlled substance, heroin, in violation of RCW 69.50.4013(1), and allegedly occurring on August 18, 2011. Clerk's Papers (CP) 1.

Mr. Ford was convicted after a jury trial, the Honorable Gordon Godfrey presiding. CP 11; see Verbatim Report of Proceedings (VRP). At sentencing held on December 19, 2011, Mr. Ford's sentencing range was determined to be twelve to twenty-four months. VRP 191-92; CP 12-15, 27-28 & 35. The court imposed twenty-four months in prison and twelve months' community custody, plus costs and fees. VRP 193; CP 35-37.

Notice of appeal was timely filed December 27, 2011. CP 42.

B. Substantive Facts

1. Evidence of the Offense.

On August 18, 2011, Mr. Ford and Jordan Lilja were at the Westport apartment of Hali Ochsner when the

police knocked, announced and entered with a key they had obtained from the building manager. VRP 124-26, 29-30, 93-94. The police were there with an arrest warrant for Ochsner. VRP 29. Ochsner, who had a pending VUCSA case, was on release on the condition that she not possess drugs. VRP 125. Mr. Ford, who was visiting Ochsner, had been there about an hour when the police arrived. VRP 127. Ochsner had not seen Mr. Ford for some time before that. VRP 126.

Ochsner was in the spare bedroom of the apartment when she saw two police cars pull into the complex that afternoon. VRP 127. She had used heroin and methamphetamine a number of times that day and within an hour of the police arrival. VRP 140. According to Lilja, however, neither he nor Mr. Ford had done any drugs. VRP 110. Lilja used heroin, however. He had taken heroin the previous day and had done so in the past with Ochsner. VRP 119-20.

Likely high, Ochsner returned to the living room to dispose of drugs left out on her coffee table before the police arrived. Mr. Ford's backpack was the closest

thing to the table. VRP 128. Ochsner testified that she put heroin, methamphetamine, a scale, some rags, some needles--whatever she could grab from the table--into the pack. VRP 142-43, 131. Lilja also testified that Ochsner put items in the backpack. VRP 112, 119, 122. Ochsner did not have much time to conceal the materials, maybe a minute. VRP 144.

Grays Harbor County Deputy Sheriff Robert J. Wilson executed the arrest warrant at around 1 p.m., along with Deputy Kevin Schrader. VRP 29, 93. They heard scuffling inside the apartment after the knock. VRP 30, 34. As they entered, they stepped into a small hallway and could immediately see into kitchen and living room area. VRP 30.

Mr. Ford, Ochsner and Lilja were all in the living room. VRP 31, 95. Mr. Ford was standing behind one smaller couch, where Ochsner was seated; Lilja was seated on the other couch. VRP 32-33, 97-98, 114, *cf.* 114, 132 (Lilja and Ochsner testified Ochsner was standing by the couch when the police arrived). Schrader seized control of the three occupants and took

Ochsner into custody; Wilson ensured no one else was in the apartment. VRP 34-35.

On the coffee table in the living room were numerous items of drug paraphernalia, a baggy that appeared to contain methamphetamine, a dark, sticky substance on a green coin that appeared to be heroin, a baggy apparently containing small traces of heroin, a white crystal powder that appeared to be either cocaine or methamphetamine on a glass plate and digital scales. VRP 35, 95. At that point, Mr. Ford and Lilja were both taken into custody. Wilson transported the arrestees to the county jail and obtained a search warrant for the apartment while Schrader remained behind to safeguard the scene. VRP 36-37. Schrader was later relieved by another employee of the sheriff's department. VRP 37, 96. The suspected controlled substances on the coffee table were later confirmed to be heroin and methamphetamine. VRP 22, 25.

During the search, Wilson recovered a cigarette pack and baggy from the couch, both contained a black sticky substance later identified as heroin. VRP 22,

45-46, 63. From a coat located behind the couch that could have been a woman's coat, Wilson found a baggy containing a substance later identified as heroin. VRP 22, 67, 82. In Mr. Ford's backpack, located on one of the couches, VRP 63, the deputy recovered several small baggies with spider insignia usually used for methamphetamine-like controlled substances, VRP 48-49, a set of camouflage-decorated digital scales commonly used to weigh controlled substances, VRP 50-51, two small baggies of a black tarry substance later identified as heroin, VRP 21 & 62, and two small baggies with spider insignias containing a white crystal substance later identified as methamphetamine. VRP 22, 62-63. The controlled substances in the backpack were located in a small brown coin purse in the main pouch of the pack. VRP 70.

The officer also found duct tape on the coffee table with a camouflage pattern similar to the pattern on the digital scales found in the back pack. VRP 73-74. When the officers entered the living room, Ochsner was closer to the back pack than Mr. Ford was. VRP 77.

The officers found no controlled substances either on Mr. Ford's person or in his car. VRP 79. Among other things, Ochsner identified the duct tape as her boyfriend's, VRP 133, the scale recovered from the backpack as hers, VRP 134, and all the items on the coffee table as hers, not Mr. Ford's. VRP 134. The coat also could have been hers. VRP 138.

Deputy Wilson testified that prior to the search, Ochsner told him Mr. Ford had brought the drugs to the apartment and that they had all three been using methamphetamine and heroin that day. VRP 151. This evidence was not admitted for its truth, but to impeach Ochsner's testimony. VRP 150-51. Ochsner had testified she did not tell Wilson Mr. Ford brought the drugs to the apartment or that they were both using methamphetamine and heroin. VRP 146 (testimony also not admitted for its truth). She also said Wilson told her they had found drugs in Mr. Ford's backpack so Ford was already in trouble. VRP 147. She witnessed the search of the backpack prior to her arrest and prior to obtaining the search warrant. VRP 155. Wilson denied

searching the backpack before obtaining the warrant.

VRP 154.

2. Closing Arguments and Jury Instructions.

During closing arguments, the State said the following about reasonable doubt:

And the judge has instructed you as to the definition of reasonable doubt, a doubt for which a reason exists and may arise from the evidence or the lack of evidence, fully and fairly and carefully considering all the evidence. If after such a consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. As I said in voir dire, this is the highest standard in the law, highest standard of proof. I don't shy away from it, I would submit to you that I have met it in this case.

An abiding belief in the truth of the charge. If you can walk out - if you can find the defendant guilty and walk out of here knowing that you have done the right thing, that you don't have any question in your mind that you've done the right thing, you've been convinced beyond a reasonable doubt.

VRP 162-63. Defense counsel objected, VRP 163, and the court admonished:

The instructions speak for themselves. Remarks and statements of counsel are not evidence. They are inserted [sic] in the instructions. The jury will follow the instructions. Proceed.

VRP 163. The court gave the following instruction on reasonable doubt:

Mr. Ford has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

Justin Ford is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 6-7 (Jury Instruction No. 7). This instruction was modified from the pattern instruction to omit the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]." See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008) (WPIC). Defendant's Proposed Jury Instructions had included the sentence, CP 52 (Proposed Instruction No. 3);

Plaintiff's Proposed Jury Instructions had not. CP 46
(Proposed Instruction No. 7).

Defense counsel began his opening argument
disputing the prosecution's characterization of
reasonable doubt:

Counsel made a characterization regarding
reasonable doubt that I would like to
strongly dispute[. Y]our instructions say
nothing about reasonable doubt leaving here
with a good feeling you did the right thing.
That's - that would be a gut feeling to your
task. That is not what this is about.

VRP 171.

Among other things, defense counsel argued that
only Lilja, Ochsner and Mr. Ford knew what was on the
coffee table before the police arrived. VRP 177, 180,
181 ("We don't know if [Ochsner] flushed anything down
the toilet while in those few seconds before the
officers arrived."). On rebuttal, the State argued that
defense counsel "said we don't know what else was on
the table, we don't know if Ms. Ochsner flushed
anything down the toilet. Well, she never said that she
flushed anything down the toilet and he certainly would
have asked her about it." VRP 186.

The court gave the following instruction on possession:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 7 (Jury Instruction No. 8).

IV. ARGUMENT

POINT I: The Trial Court's Erroneous Reasonable Doubt Jury Instruction, Omitting the Sentence Informing the Jury the Defendant Had No Burden to Prove Reasonable Doubt, Was Manifest Constitutional Error Requiring Reversal

A. The Instruction was Manifest Constitutional Error

The trial court violated Mr. Ford's due process rights and committed manifest constitutional error when it failed to instruct the jury Mr. Ford had no burden to establish reasonable doubt. The incorrect instruction shifted the burden of proof and undermined the presumption of innocence.

Jury instructions "must define reasonable doubt and clearly communicate that the State carries the burden of proof." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole." *Id.* Although Mr. Ford did not object to the jury instruction in this case, an incorrect instruction as to reasonable doubt is manifest constitutional error that may be heard for the first time on appeal. RAP 2.5(a); State v. Lundy, 162 Wn. App. 865, 870, 256 P.3d

466 (2011) (noting no trial objection and deciding issue of nonconforming reasonable doubt instruction); see also State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (noting, "RAP 1.2(a) mitigates the stringency of [RAP 2.5(a)], providing that the RAPs are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

First, use of an incomplete WPIC 4.01 reasonable doubt jury instruction is error. Five years ago, our Supreme Court instructed trial courts to use "WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." Bennett, 161 Wn.2d 303, 318. While the Court found the jury instruction at issue in Bennett passed constitutional muster, it exercised its inherent supervisory powers to require trial courts to use WPIC 4.01 until a better instruction is approved. 161 Wn.2d 303, 318.

After Bennett, a reasonable doubt instruction that does not follow WPIC 4.01 is per se erroneous. Lundy, 162 Wn. App. 865, 871 (holding instruction that

modified WPIC 4.01 was error after Bennett); see State v. Castillo, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009) (State conceded nonconforming instruction was erroneous). Thus, the use of the instruction in this case, which omitted a sentence from the instruction mandated by the Supreme Court, was error.

Next, the error was of constitutional magnitude because an insufficient reasonable doubt instruction violates due process clause. U.S. Const. amend. XIV; Wash. Const. Art. I, Sec. 3; see Bennett, 161 Wn.2d 303, 315 (holding Castle instruction, which contained the sentence omitted here, satisfied the federal due process clause);¹ Lundy, 162 Wn. App. 865, 871-72 (applying constitutional harmless error analysis to nonconforming reasonable doubt instruction); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (holding failure to define reasonable doubt and to instruct jurors that the prosecution must prove each

1. The so-called Castle instruction is named for the first Washington case in which it appeared, State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997). Bennett, 161 Wn.2d 303, 306 n.1.

element by this standard is a "grievous constitutional failure").

Further, the error was manifest. A constitutional error is manifest if the appellant can show "practical and identifiable consequences in the trial of the case" or the error was "so obvious on the record that the error warrants appellate review." State v. Gordon, 172 Wn.2d 671, 676, 676 n.2, 260 P.3d 884 (2011). Here, omitting the only sentence of the mandated WPIC 4.01 that explains the defendant does not have the burden of proving reasonable doubt was an obvious error warranting appellate review. Moreover, the error had practical and identifiable consequences in the trial as it left open the issue of how reasonable doubt is established and allowed a rational juror to infer that the State proves the elements and the defendant proves the reasonable doubt.

B. The Erroneous Reasonable Doubt Instruction Created Structural Error Because it Shifted the Burden of Proving Doubt to Mr. Ford, Undermining the Presumption of Innocence

The omission of the sentence explaining Mr. Ford was not required to prove reasonable doubt

fundamentally altered the meaning of WPIC 4.01, undermining the presumption of innocence and creating structural error. While minor changes to WPIC 4.01 may pass constitutional muster, the Court intended trial courts to use WPIC 4.01 verbatim, given the fundamental right at stake:

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.

Bennett, 161 Wn.2d 303, 318. Indeed, the Court approved WPIC 4.01 as a whole and in its entirety, cautioning trial courts against making *any* changes that would shift, however *slightly*, the emphasis of the instruction:

We recognize that the concept of reasonable doubt seems at times difficult to define and explain. We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

Bennett, 161 Wn.2d 303, 317.

Since Bennett, Washington courts have upheld jury instructions that deviated from WPIC 4.01, but no instruction lacking the sentence omitted in this case appears to have been approved. Bennett, 161 Wn.2d 303, 309 (Castle instruction the Court deemed constitutional contained the sentence omitted in this case, "The defendant has no burden of proving that a reasonable doubt exists."); Lundy, 162 Wn. App. 865, 871 (modified WPIC 4.01 instruction deemed constitutionally harmless included sentence, "The defendant has no burden of proving that a reasonable doubt exists."); see also State v. Dykstra, 127 Wn. App. 1, 10, 110 P.3d 758 (2005) (pre-Bennett case upholding Castle instruction because the instruction stated, *inter alia*, "the defendant has no burden to prove that a reasonable doubt exists"); but see Castillo, 150 Wn. App. 466, 473 (jury instruction omitting this sentence was deemed to "fall[] short of the full statement of the correct standard").

Under these circumstances, the error in this case is an error of a different magnitude than the one occurring in Lundy and Bennett. Omission of the sentence explaining the defendant is not responsible for establishing reasonable doubt shifted the emphasis of the instruction significantly, tipping the balance in favor of the State and undermining the presumption of innocence. The remainder of the instruction left the jury with the inference that while the State proves the elements, the defendant must establish enough doubt to acquit. But establishing reasonable doubt is not the defendant's burden. WPIC 4.01 ("The defendant has no burden of proving that a reasonable doubt exists [as to these elements]"); State v. Emery, ___ P.3d ___, 2012 WL 2146783, *8, No. 86033-5, (June 14, 2012) ("the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden"); State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (defendants are "entitled to the benefit of a reasonable doubt").

Yet, in this case, the jury was authorized to look to Mr. Ford for reasons to acquit. While the instruction in this case told the jury the State had to prove each element beyond a reasonable doubt, it gave the jury the incorrect impression Mr. Ford had to establish reasonable doubt. Thus, the verdict may have been based on some jurors' belief that Mr. Ford failed to establish sufficient doubt to acquit. This possibility is a due process violation.

Indeed, the faulty reasonable doubt instruction in this case undermined the presumption of innocence as it allowed reasonable doubt to be perceived as Mr. Ford's burden:

The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

Bennet, 161 Wn.2d 303, 315-16. Under these circumstances, given the significance of the omitted sentence, use of the instruction amounted to structural

error requiring automatic reversal. *Cf. Lundy*, 162 Wn. App. 865, 872 (declining to hold use of the rearranged WPIC 4.01 was structural error) and *Castillo*, 150 Wn. App. 466, 472 (holding automatic reversal required when instruction other than WPIC 4.01 used).

Structural errors are "error so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome" of the trial. *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "An error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009), *quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Structural errors occur only in a very limited class of cases. *Neder*, 527 U.S. at 8. Nevertheless, a reasonable doubt jury instruction that could have been interpreted to lower the State's burden of proof has been held to be structural error. *Sullivan*

v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

The reasonable doubt jury instruction in this case, lacking the sentence explaining the defendant did not need to prove reasonable doubt, was structural error because it allowed the inference that reasonable doubt was Mr. Ford's burden and, thus, undermined the presumption of innocence. Accordingly, this Court should reverse Mr. Ford's conviction for structural error.

C. If Not Structural, the Error Was Nevertheless Not Harmless Beyond a Reasonable Doubt

If the Court holds the error was not structural, Mr. Ford's conviction should be reversed because the error was not harmless beyond a reasonable doubt. Lundy, 162 Wn. App. at 871 (applying constitutional harmless error analysis to nonconforming reasonable doubt jury instruction); *but see* Castillo, 150 Wn. App. 466, 472 (Division 1 requires no finding of harm to reverse conviction when nonconforming reasonable doubt instruction used). "Constitutional error is presumed to be prejudicial and the State bears the burden of

proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this standard, vacation of the conviction is required "unless it necessarily appears, beyond a reasonable doubt," that the error "did not affect the verdict." State v. Monday, 171 Wn.2d 667, 680, 297 P.3d 551 (2011). An error is harmless beyond a reasonable doubt if the evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d 412, 425. In this case, the nature of the error prevents the State from meeting its burden of establishing harmlessness beyond a reasonable doubt, the evidence was not so overwhelming in this case to overcome the presumption of prejudice, and the State's argument shifted the burden of proof, compounding the harm of the erroneous instruction.

First, the error in this case was such a fundamental error that it cannot be shown harmless beyond a reasonable doubt. See, e.g., Monday, 171 Wn.2d 667, 680 n.4, 681 (when prosecutor appealed to racial bias in questioning and argument, Court did not

consider strength of State's case in finding error not harmless beyond reasonable doubt). As explained above, omission of the sentence which explained the defendant need not prove reasonable doubt shifted the burden of proof, allowing a reasonable juror to infer Mr. Ford bore the burden of establishing enough doubt to acquit. Under these circumstances, the instruction created the possibility that the verdict was based on the jury's incorrect belief that it was Mr. Ford's burden to establish doubt. This possibility cannot be disproved or shown harmless beyond a reasonable doubt.

In addition, the evidence against Mr. Ford was not so strong as to show that he would have been convicted without the erroneous instruction. The central question in the case was whether Mr. Ford had dominion and control over his backpack. He presented two witnesses who testified that he did not have dominion and control, because Ochsner had access to his backpack and, indeed, had put the heroin in his backpack. The State proved heroin was in his backpack, but had no evidence as to how it got there. In addition, it had no

evidence that disputed Ochsner's and Lilja's testimony. Under these circumstances, the evidence Mr. Ford possessed the drugs was not so strong that the erroneous reasonable doubt jury instruction was harmless beyond a reasonable doubt. See Point II, below.

Finally, the error was not harmless beyond a reasonable doubt when the State made a burden-shifting argument that exacerbated the harm of the erroneous instruction. In Castillo, the court found omitting from a reasonable doubt jury instruction the same sentence omitted here was significant when the State had suggested the defendant needed to prove why a victim would lie. Castillo, 150 Wn. App. 466, 473. Similarly, in this case, the omission of the sentence was significant when the State suggested Mr. Ford had to prove what was on the coffee table before the police arrived. VRP 186 (State argued, defense counsel "said we don't know what else was on the table, we don't know if Ms. Ochsner flushed anything down the toilet. Well, she never said that she flushed anything down the

toilet and he certainly would have asked her about it"). VRP 186. When the State's argument, combined with the sentence omitted from the jury instruction, allowed the jury to require Mr. Ford to provide the reason to acquit, the erroneous instruction prejudiced him and requires reversal.

For all these reasons, the error was either structural or not harmless beyond a reasonable doubt and this Court should reverse Mr. Ford's conviction.

Point II: The State Failed to Prove Mr. Ford's Dominion and Control over the Heroin When Ochsner Testified She Put the Heroin in His Backpack

The evidence at trial was insufficient as a matter of law to prove Mr. Ford guilty of possession of heroin. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the

defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

In this case, the State failed to prove Mr. Ford constructively possessed heroin. To prove the charged crime, the State was required to prove Mr. Ford actually or constructively possessed heroin. RCW 69.50.4013(1); CP 6 (Jury Instruction No. 6) & CP 7 (Jury Instruction No. 8). The State acknowledged it needed to prove constructive possession as the evidence failed to establish actual possession. VRP 163. Constructive possession is shown by proof of dominion and control. CP 7 (Jury Instruction No. 8) ("Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance."); see State v. Ibarra-Raya, 145 Wn. App. 516, 524-25, 187 P.3d 301 (2008).

The jury instructions provided the following information on dominion and control:

Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 7 (Jury Instruction No. 8).

The State failed to prove dominion and control in this case. "Various factors determine dominion and control, and the cumulative effect of a number of factors is a strong indication of constructive possession." Ibarra-Raya, 145 Wn. App. 516, 525. Here, the only factor tending to establish Mr. Ford's dominion and control over the heroin was the fact that it was found in his backpack. Given the totality of the circumstances, that circumstance was insufficient to prove the crime.

While the heroin in this case was found in Mr. Ford's backpack, that single factor was outweighed by other circumstances tending to negate the idea of his dominion and control. For example, it was undisputed that Mr. Ford was merely visiting Ochsner and had only been there about an hour when the police arrived. VRP 127. The backpack was found in Ochsner's apartment, VRP 28-29, 47; closer to Ochsner than to Mr. Ford when the police arrived, VRP 77; and Ochsner had access to the backpack. Most significantly, Ochsner testified she put the heroin, methamphetamine and drug paraphernalia in the backpack and Lilja corroborated her testimony. VRP 112, 119, 122, 131, 142-43. Finally, there was no evidence Mr. Ford had ever used drugs. See VRP. Under these circumstances, while the backpack belonged to Mr. Ford, he did not have dominion and control over it or the heroin and the State failed to prove the charged crime.

Ochsner's undisputed testimony, corroborated by Lilja's testimony, that Ochsner put the heroin in the backpack, requires this Court to find the State failed

to prove Mr. Ford's dominion and control. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). In Callahan, a witness gave uncontradicted testimony that he was the sole owner of drugs the State charged the defendant with possessing. The drugs were found near the defendant on a houseboat where he had been staying as a guest and he had admitted handling them that day. 77 Wn.2d 27, 31. Under these circumstances, the Court held the witness's testimony undercut the State's circumstantial evidence of dominion and control:

Evidence pointing to any dominion or control the defendant might have over the drugs was purely circumstantial and it is not within the rule of reasonable hypothesis to hold that proof of possession by the defendant may be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person.

77 Wn.2d 27, 31-32. For the same reason the conviction was reversed in Callahan, it should be reversed here: Ochsner's corroborated and undisputed testimony established she, not Mr. Ford, had dominion and control over the heroin.

Further, the lack of evidence Mr. Ford used heroin and the State's inability to rule out Ochsner, an

admitted heroin user, as the heroin's owner also requires reversal. State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008). In George, police found a drug pipe with residue in it on the floor of a car near the feet of the backseat passenger; two known heroin users sat in the front seat. The court held the State failed to prove the passenger's dominion and control over the drugs when it had not proven he was a drug user, it had not ruled out the other occupants' possession of the pipe and the defendant made no admission of guilt. George, 146 Wn. App. 906, 922.

Similarly here, there was no evidence Mr. Ford used heroin, while Lilja and Ochsner were admitted users, and the State did not rule out Ochsner's ownership of the drugs. VRP 119-20, 140. These facts, combined with the lack of other evidence of dominion and control, plus Ochsner's and Lilja's testimony, require this Court to reverse Mr. Ford's conviction. See State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990) (holding insufficient evidence of dominion and control when defendant was guest in house where drugs

found and his fingerprint was on a plate that had held drugs and apparently was thrown upon police arrival).

Under these circumstances, the State failed to prove Mr. Ford possessed heroin and this Court should reverse his conviction.

**Point III: Improper Prosecutorial Comment Deprived
 Mr. Ford of His Right to a Fair Trial**

Mr. Ford was deprived of his right to a fair trial by the prosecutor's misconduct in this case. Defendants are guaranteed the right to a fair and impartial trial by the Sixth and Fourteenth Amendments of the United States Constitution, and by article I, section 3 and article I, section 22 (amendment 10) of the Washington Constitution. In re Crace, 157 Wn. App. 81, 96, 236 P.3d 914 (2010). "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011); *citing*, State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

A prosecuting attorney, a quasijudicial officer, must act with impartiality in the interest of justice and "subdue courtroom zeal for the sake of fairness to

the defendant." State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citations omitted). While "the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence" in closing arguments, Thorgerson, 172 Wn.2d 438, 443, the prosecutor also owes the defendant a duty to ensure the right to a fair trial is not violated. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011), *citing*, State v. Monday, 171 Wn.2d 667, 676, 297 P.3d 551 (2011).

To prevail on appeal, Mr. Ford must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, 172 Wn.2d 438, 442 (citations omitted). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be

ineffective." State v. Russell, 125 W.2d 24, 86, 882 P.2d 747 (1994).

Conduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). This Court reviews prosecutors' comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Evans, 163 Wn. App. 635, 642, *citing*, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When the trial court overruled a defense objection, the trial court's ruling is reviewed for abuse of discretion. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010) (citations omitted).

In this case, the prosecutor's comment was both improper and prejudicial as it told the jury the "right thing" to do was convict:

An abiding belief in the truth of the charge.
If you can walk out - if you can find the
defendant guilty and walk out of here knowing
that you have done the right thing, that you
don't have any question in your mind that

you've done the right thing, you've been
convinced beyond a reasonable doubt.

VRP 163. A prosecutor's argument carries particular weight because "[t]he jury knows that the prosecutor is an officer of the State." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Here, the prosecutor's argument, telling jurors that to convict is to do "the right thing," blended aspects of two types of improper argument, arguments in which prosecutors urge jurors to "declare the truth" and "remedy" the crimes.

Telling jurors a guilty verdict is doing "the right thing" is similar to telling them to declare the truth with a guilty verdict. Such argument is error. State v. Emery, ___ P.3d ___, 2012 WL 2146783, *3 & *8 No. 86033-5, (June 14, 2012) ("The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'").

The "do the right thing" argument is also similar to the argument that the jury "remedy" the crime, another improper argument. Prosecutors commit misconduct when they appeal to a community conscience for a verdict:

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Ramos, 164 Wn. App. 327, 333, *quoting*, United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) ("Appeals to the jury's passion and prejudice are improper."). For these reasons, the State's argument was improper.

The State's "do the right thing" argument was also prejudicial, given the nature of the State and defense cases. The State established heroin was found in Mr. Ford's backpack; the only issue was whether Mr. Ford possessed the heroin. Whether he possessed the heroin rested largely on the testimony of Mr. Ford's two witnesses. These witnesses testified Mr. Ford did not have dominion and control over the heroin because

Ochsner put the heroin in Mr. Ford's backpack when she knew the police were arriving imminently. Thus, the case came down largely to the credibility of Mr. Ford's witnesses.

In cases where a conviction is reversed for prosecutorial error, the evidence has generally been a "credibility contest." State v. Walker, 164 Wn. App. 724, 737-38, 265 P.3d 191 (2011), *discussing*, State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). Walker reversed the defendant's conviction due to several unobjected-to errors when the evidence against the defendant "was largely a credibility contest in which the prosecutor's improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738.

Here, similarly, the evidence was a credibility contest with the main issue--whether the Mr. Ford possessed the heroin--in dispute. Under these circumstances, and as was held in Walker, Johnson and Venegas, the prosecutor's comment could easily have

been the deciding factor, denying Mr. Ford his right to a fair trial and requiring reversal.

Moreover, Mr. Ford was prejudiced even though the trial court gave a curative instruction and defense counsel explained the jury's job is not to do the right thing. VRP 163 & 171. The court rightly directed the jury to the jury instructions. However, as discussed above, the reasonable doubt jury instruction was erroneous. Thus, the instruction did not fully ameliorate the prosecutorial error. When the case is considered as a whole, the incorrect instruction, combined with the prosecutor's statement, combined to prejudice Mr. Ford.

For all these reasons, the prosecutor's comment was both improper and prejudicial and this Court should reverse Mr. Ford's conviction.

V. CONCLUSION

For all of these reasons, Justin J. Ford respectfully requests this Court to reverse his conviction.

Dated this 28th day of June 2012.

Respectfully submitted,

/s/ Carol Elewski

Carol Elewski, WSBA # 33647

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 28th day of June, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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Carol Elewski

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